FILED
MAR 13
MICHAEL RODAK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Solicitor General of Wisconsin

E. WESTON WOOD
Assistant Attorney General of Wisconsin

Counsel for Respondent

Post Office Address:
114 East, State Capitol
Madison, Wisconsin 53702

March 12, 1974

INDEX AND SYNOPSIS OF ARGUMENT

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2-5

ARGUMENT 6-11

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein Because It Decided No Federal Question 6-11

A. No federal question was properly presented to or decided by the Wisconsin Supreme Court 6-8

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court 8-11

CONCLUSION 11

CASES CITED

Bloeth v. New York (1962),
82 S.Ct. 661, 7 L.Ed. 2d 780 8

Bowe v. Scott (1914),
233 U.S. 658, 34 S.Ct. 769, 58 L.Ed. 1141 7

Brinkerhoff-Faris Trust & Sav. Co. v. Hill (1930),
281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 10

Capital City Dairy Co. v. Ohio (1902),
183 U.S. 238, 22 S.Ct. 120, 46 L.Ed. 171 7

Page

Cardinale v. Louisiana (1969),
394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 9

DeBacker v. Brainard (1969),
396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148 10

Durley v. Mayo (1956),
351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 8

Hanson v. Denckla (1958),
357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 8

Henry v. Mississippi (1965),
379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 11

Herb v. Pitcairn (1945),
324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 11

Herndon v. Georgia (1935),
295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 7

Hill v. California (1971),
401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed. 2d 484 10

Hope Acres, Inc. v. Harris (1965),
27 Wis. 2d 285, 134 N.W. 2d 462, 135 N.W. 2d 775 8

Lawn v. United States (1958),
355 U.S. 339, 78 S.Ct. 311, 2 L.Ed. 2d 321 8

Martinson v. Brooks Equipment Leasing, Inc. (1967),
36 Wis. 2d 209, 152 N.W. 2d 849, 154 N.W. 2d 353 8

Monks v. New Jersey (1970),
398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54 10

Neely v. Eby Construction Co. (1967),
386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 8

Page

Oxley Stave Company v. Butler County (1897),
166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 7

Radio Station WOW, Inc. v. Johnson (1944),
326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 8

United Gas Public Service Co. v. Texas (1938),
303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702 11

Uren v. Purity Dairy Co. (1948),
252 Wis. 446, 32 N.W. 2d 615, 33 N.W. 2d 213 8

UNITED STATES STATUTE

28 U.S.C. §1257 (3) 2,8

WISCONSIN STATUTE

Section 71.10 (3) (a) 4

OTHER AUTHORITY

5 C.J.S., Appeal and Error, §1421a 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1268

EUGENE H. SKAAR and
ELLEN SKAAR, his wife,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported in 61 Wis. 2d 93, 211 N.W. 2d 642, and is reproduced in the petitioners' appendix, pages 1 through 13. A motion for rehearing was denied by the Wisconsin Supreme Court on December 21, 1973, without opinion. The unreported decisions of the Dane County Circuit Court and the Wisconsin Tax Appeals Commission are found, respectively, in petitioners' appendix, pages 14 through 25 and 28 through 36.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under the provisions of 28 U.S.C. §1257 (3). This Court, however, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court since that court decided no federal question.

QUESTIONS PRESENTED

No federal question is properly presented herein. The "Questions Involved" as set forth in the petition were neither properly presented to nor decided by the Wisconsin Supreme Court.

STATEMENT OF THE CASE

The petitioners were married in 1942 and have three children who were 21, 18, and 16 in 1966. Mr. Skaar returned from military service about the end of 1945 and started farming. Neither he nor his wife then had any wealth, except his mustering-out pay, and neither has since inherited money or other property. Until the death of his father in 1957, Mr. Skaar and his brother rented on shares two farms from their father. In 1958 the brothers continued operating as a partnership and sharing with their father's estate. Thereafter each began renting on his own. The father's will provided that each son could purchase certain farm property. Mr. Skaar operated the farm which he could buy from his father's estate and another farm which he rented from his mother.

On August 30, 1966, Mr. Skaar as vendee executed a land contract, naming him and his wife as vendees, for the purchase of the farm held by his father's trustee. In 1971 he discovered that his wife had not signed the contract, and they then both signed it. On March 1, 1967, the petitioners as vendees executed a land contract for the purchase of the farm previously rented from his mother.

The petitioners had only one bank account, a joint checking account in which they deposited all receipts, including Mr. Skaar's income from his positions as town chairman and drainage district commissioner, and from which they paid all business and personal expenses. In addition to the farm income and Mr. Skaar's separate income from his public offices, they had rental income.

Milk checks were payable to either of the petitioners but most bills came in his name only. The registered cattle on the farm were registered in the name of Mr. Skaar only, and he testified that this was done for convenience. During the years involved, 1966-68, automobiles and trucks were registered in Mr. Skaar's name only. He testified that this was done so that his insurance (and not just medical payment insurance) would cover his wife, were she injured while he was driving.

The oldest child, Vicky, left home in 1963 to enter nurses' training and did not return. The middle child, Larry, was graduated from high school in 1966 and went on to college. The younger son, John, reached age 16 on June 1, 1966. During the years involved, Mrs. Skaar maintained the home for herself, her husband, and Larry and John when they were home. Mrs. Skaar worked in the field, drove any of their eight tractors, milked and fed cows, and worked about the same amount of time in running the farm as did her husband.

For the years involved, social security self-employment taxes were paid for Mr. Skaar but not for his wife. He testified that the reason for this was to keep his income high so as to get better social security benefits than with two mediocre incomes. The total Wisconsin taxable income reported by the petitioners for the years involved was:

1966	$14,647.41
1967	10,596.70
1968	17,982.01

The petitioners did not file partnership income tax returns which, contrary to statements in the Petition, were required by Wisconsin law, sec. 71.10 (3) (a), Wis. Stats.

They each testified before the Wisconsin Tax Appeals Commission that there was an oral agreement between them as to the farming enterprise. He testified that the agreement was to put all income into a joint account and to pay expenses thereform. When asked for the terms of the agreement, he answered that he and his wife had done jointly so many things that their "oral agreements have just come by themselves." She testified that the agreement as to division of the work was that she knew she could help him with certain things when she had time, and that she had more time as the children grew up. Mr. Skaar testified that there was no agreement for dividing between them the profits of the farming enterprise. He also testified that there was no change in the agreement between himself and his wife, as to management of the farm and ownership of the property and profits, when the rental arrangement terminated and the land contracts were executed.

On their combined Wisconsin income tax returns for 1966-1968, the petitioners divided the farm income equally between them. The respondent made an assessment of additional tax against Mr. Skaar, based upon a nonrecognition of the alleged partnership. The assessment against Mr. Skaar was in the amount of $1,910.09, and it necessitated a refund in the amount of $1,002.15 to Mrs. Skaar, making the net additional assessment $907.94. The respondent denied an application for abatement, and Mr. Skaar petitioned the Commission for review.

The Commission found that the farm business records were not kept in a manner reflecting the alleged partnership, that there was no division of farm profits between the petitioners, that they did not hold themselves out to the public as being engaged in a business partnership, that they did not

file partnership income tax returns, that Mrs. Skaar did not pay self-employment social security taxes, that the farm business was not conducted by them as a partnership or joint venture, and that the farm business was conducted by Mr. Skaar as a sole proprietor. The Commission also found that the petitioners had an oral understanding that they would work together, own everything together, manage the farm together, and that if one of them died, the other would have everything, to the exclusion of their children. The Commission concluded that the farm income was taxable solely to Mr. Skaar and affirmed the denial of the application for abatement.

The lower court on review concluded that the Commission's finding of fact that the farm was not conducted by the petitioners as a partnership or joint venture was a conclusion of law, rather than a finding of fact, and also concluded that the Commission erred as a matter of law in concluding that the petitioners did not conduct their farming operations as a partnership or joint venture.

The Wisconsin Supreme Court reversed the judgment of the lower court. It, with two justices dissenting, found that under Wisconsin law the petitioners had failed to establish that they had, in fact, formed a bona fide partnership for Wisconsin income tax purposes during the tax years 1966 through 1968 and that the Wisconsin Tax Appeals Commission had properly so concluded.

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein Because It Decided No Federal Question.

A. No federal question was properly presented to or decided by the Wisconsin Supreme Court.

The respondent herein was the appellant in the Wisconsin Supreme Court. The issue raised by it was solely an issue of state law. As described by the Wisconsin Supreme Court in its decision:

> "The sole issue is whether the Wisconsin Tax Appeals Commission erred in affirming the Department of Revenue's denial of the taxpayer's application for abatement of the additional [Wisconsin] income tax assessment by concluding that, as a matter of law, no bona fide [Wisconsin] partnership existed." (App. to Petition, p. 4.)

The petitioners did not cross appeal nor did they otherwise present to the Wisconsin Supreme Court the questions raised by them in their petition to this Court. Included in the "Issues Involved" section of the petitioners' state court respondents' brief, in which a number of issues were listed, was the word "unconstitutional," but no reference was made in that section to the United States Constitution or any specific provision thereof. Use of the word "unconstitutional" or some similar ambiguous word or phrase is completely insufficient

to raise a federal question in a state court and to preserve that question for review by this Court.[1]

The Wisconsin Supreme Court reversed the judgment of the lower court because it determined that the Wisconsin Tax Appeals Commission had properly affirmed the decision of the present respondent under Wisconsin law and for Wisconsin income tax purposes since:

> "* * * on the facts of this case the taxpayers have failed to establish that they have in fact formed a bona fide partnership." (App. to Petition, p. 10.)[2]

The Wisconsin Supreme Court, therefore, determined only a question of state law and the federal questions which the petitioners now attempt to raise in this Court were neither properly raised in nor decided by the Wisconsin Supreme Court.

The petitioners did subsequently make a motion for rehearing to the Wisconsin Supreme Court and they did then attempt to raise some federal constitutional issues. The rule in Wisconsin, and elsewhere, however, is that the supreme court will not consider questions raised for the

---

[1] See, *Oxley Stave Company v. Butler County* (1897), 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149; *Capital City Dairy Co. v. Ohio* (1902), 183 U.S. 238, 248, 22 S.Ct. 120, 46 L.Ed. 171; *Bowe v. Scott* (1914), 233 U.S. 658, 664, 665, 34 S.Ct. 769, 58 L.Ed. 1141; and *Herndon v. Georgia* (1935), 295 U.S. 441, 442, 443, 55 S.Ct. 794, 79 L.Ed. 1530.

[2] The Wisconsin Supreme Court made mention of the "multiple issues" in the present petitioners' respondents' brief, but held that "an answer was not required so as to decide the controlling question involved." (App. to Petition, p. 9.)

first time on a motion for rehearing.[3] It, therefore, denied the motion for rehearing without opinion.

This Court, in the absence of some extraordinary circumstances, will not review questions which were not properly raised below.[4] A question is not properly raised below when, as here, it was first raised on a motion for rehearing which the state court denied without opinion.[5]

B. This Court, therefore, lacks jurisdiction to review the judgment of the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257 (3). Such jurisdiction exists *only* when a federal question has been properly presented to and decided by the highest court of the state and its decision of the federal question was necessary in its determination of the cause. In *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183, this Court wrote:

Martinson v. Brooks Equipment Leasing, Inc. (1967), 36 Wis. 2d 209, 224b, 152 N.W. 2d 849, 154 N.W. 2d 353; *Hope Acres, Inc. v. Harris* (1965), 27 Wis. 2d 285, 300a, 134 N.W. 2d 462, 135 N.W. 2d 775; and *Uren v. Purity Dairy Co.* (1948), 252 Wis. 446, 459a, 459b, 32 N.W. 2d 615, 33 N.W. 2d 213. Generally see, 5 C.J.S., *Appeal and Error*, §1421a, p. 547.

[4] *Lawn v. United States* (1958), 355 U.S. 339, 362, n. 16, 78 S.Ct. 311, 2 L.Ed. 2d 321, and *Neely v. Eby Construction Co.* (1967), 386 U.S. 317, 330, 87 S.Ct. 1072, 18 L.Ed. 2d 75.

[5] *Hanson v. Denckla* (1958), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283; *Radio Station WOW, Inc. v. Johnson* (1944), 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092; *Bloeth v. New York* (1962), 82 S.Ct. 661, 7 L.Ed. 2d 780.

" 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v. New York, 293 US 52. * * *' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction because of a failure to raise the federal question in the highest state court is *Cardinale v. Louisiana* (1969), 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398. This Court, in dismissing the writ, wrote (394 U.S. 437, 438):

"Although certiorari was granted to consider this question [admissibility of a confession], the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with *no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'* 10 Pet 368, 391, 9 L Ed 458, 467. *The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion.* Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819),

and since, e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)

See also the still more recent cases of *Hill v. California* (1971), 401 U.S. 797, 805, 806, 91 S.Ct. 1106, 28 L.Ed. 2d 484, 490, 491; *Monks v. New Jersey* (1970), 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54; and *DeBacker v. Brainard* (1969), 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148.

As revealed by the opinion of the Wisconsin Supreme Court herein, none of the questions presented by this Petition were properly raised in or decided by the Wisconsin Supreme Court.

The sole question presented to the Wisconsin Supreme Court and decided by it was a question of state law. Questions of state law are not reviewable by this Court on a petition for certiorari to review a judgment of the highest court of a state. This fact was pointed out by Justice Brandeis in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, wherein he wrote:

"It is true that *the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state*; that *this court's power to review decisions of state courts is limited to their decisions on*

federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court." (Emphasis added.)

See also *Henry v. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408; *Herb v. Pitcairn* (1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *United Gas Public Service Co. v. Texas* (1938), 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702, and many others.

CONCLUSION

For the above reason this Court has no jurisdiction to review the judgment of the Wisconsin Supreme Court herein and the petition for certiorari should be denied.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Solicitor General of Wisconsin

E. WESTON WOOD
Assistant Attorney General of Wisconsin

Counsel for Respondent

Post Office Address:
114 East, State Capitol
Madison, Wisconsin 53702

March 12, 1974